IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARTIN WAYNE TALMADGE, Appellant.	)	2 CA-CR 2002-0153 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-48365

Honorable Charles S. Sabalos, Judge

REVERSED AND REMANDED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane M. Acosta — Phoenix
Attorneys for Appellee

Wanda K. Day — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Defendant/appellant Martin Talmadge was convicted after a jury trial of two counts of abusing a child under age fifteen, under circumstances likely to produce death or serious injury, both class two felonies, and nine counts of abusing a child, under circumstances not likely to produce death or serious injury, class four felonies. The court sentenced him to presumptive, consecutive seventeen-year prison terms on the first two counts and suspended the imposition of sentence on the remaining counts, imposing concurrent terms of lifetime probation on each. Martin raises five issues on appeal, contending, *inter alia*, that the trial court erroneously instructed the jury on the elements of child abuse so as to lessen the state's burden to prove every element of the offense. We agree that the trial court erroneously instructed the jury and reverse.[1]

¶2 Martin and his wife Audra Talmadge were arrested for child abuse in January 1995 after doctors discovered their infant daughter, A., had numerous rib, leg, and skull fractures. The state removed A. from Audra and Martin's home and placed her in foster care. A Pima County grand jury charged the Talmadges with fifteen counts of child abuse. The indictment alleged that counts one, two, and three had been committed under circumstances likely to result in death or serious physical injury, based on A.'s skull fractures. The remaining counts arose from A.'s other fractures and Audra's and Martin's alleged failure to seek medical treatment for all her fractures.

---

[1]Because we reverse his conviction on that ground, we need not address the remaining issues he has raised, except to the extent those issues will likely recur in the next trial. *See State v. Diaz*, 166 Ariz. 442, 444, 803 P.2d 435, 437 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991).

¶3 At their first trial in 1996, the state dismissed count two. The jury acquitted Martin and Audra on counts ten, thirteen, and fourteen and found them guilty of the remaining eleven counts. But after we affirmed Audra's convictions and sentences, *State v. Talmadge*, No. 2 CA-CR 96-0555 (memorandum decision filed Mar. 12, 1998) (*Talmadge I*), the supreme court vacated our decision and reversed Audra's convictions because the trial court had erroneously precluded her expert witness's surrebuttal testimony on temporary brittle bone disease (TBBD). *State v. Talmadge*, 196 Ariz. 436, 999 P.2d 192 (2000) (*Talmadge II*). Based on this ruling, Martin moved to supplement his petition for post-conviction relief, which Martin had sought pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and the trial court granted him a new trial. The two were tried jointly in 2002 on the eleven remaining counts.

¶4 During the second trial, both Martin and Audra denied abusing A., contending she suffered from a bone disease, TBBD, that could cause fractures in a baby after normal handling. The jury found Audra and Martin guilty of all charges.

CHILD ABUSE INSTRUCTION

¶5 Martin argues the trial court provided the jury with erroneous, prejudicially ambiguous instructions on the elements of child abuse.[2] Generally, we review *de novo* whether a jury instruction correctly states the law, but review a trial court's refusal to give

[2]We note the state responds to this argument as if Martin had argued the instruction was erroneous only as to the first two counts of the indictment. We find no such limitation in his argument.

a requested instruction for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006).

¶6 Preliminarily, the state contends that Martin waived the arguments he now asserts because he did not object below to the instruction on the same grounds he argues on appeal. But Martin objected to the instruction, contending it was "convoluted" and "compound" and that jurors might not be able to separate each element the state was required to establish. Martin's claim on appeal—that the instruction's compound construction rendered it ambiguous and could have led the jury to believe the state did not have to prove he had had the requisite mental state to find him guilty of child abuse—was sufficiently conveyed by the objection he had made. Even if we were to consider Martin's objection below different than the argument he now raises, he would be entitled to relief if the trial court committed fundamental, prejudicial error when instructing the jury. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "Fundamental error is present when a trial judge fails to instruct on matters vital to a proper consideration of the evidence." *State v. Schad*, 142 Ariz. 619, 620, 691 P.2d 710, 711 (1984).

¶7 Section 13-3623, A.R.S., provides as follows:

> A. Under circumstances likely to produce death or serious physical injury, any person who causes a child . . . to suffer physical injury or, having the care or custody of a child . . . who causes or permits the person or health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered is guilty of an offense as follows:

> 1. If done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13-604.01.
>
> 2. If done recklessly, the offense is a class 3 felony.
>
> 3. If done with criminal negligence, the offense is a class 4 felony.

Martin was charged with several counts of child abuse, two of which were alleged to have been committed "[u]nder circumstances likely to produce death or serious physical injury." § 13-3623(A). The remaining counts were based on § 13-3623(B); the only distinction was that the abuse allegedly had been committed "[u]nder circumstances *other than those* likely to produce death or serious physical injury." (Emphasis added.) Audra and Martin were charged with intentional or knowing child abuse on all counts.

¶8 The jury was instructed as follows:

> Under circumstances likely to produce death or serious physical injury, any person who intentionally or knowingly causes a child to suffer physical injury or, having the care or custody of such child, causes or permits the person or health of such child to be injured, or causes or permits such child to be placed in a situation where its person or health is endangered is guilty of child abuse.[3]

Martin argues that the placement of the clause "intentionally or knowingly" only before the first clause, "caus[ing] a child to suffer physical injury," made the instruction ambiguous; it permitted the jury to find him guilty of child abuse for merely failing to act without finding

[3]As to the lesser counts, the instruction only differed by a few words: the jury was instructed the abuse must have been committed "[u]nder circumstances *other than those* likely to produce death or serious physical injury." (Emphasis added.)

he had the requisite culpable mental state. Because it is unclear whether the words "intentionally or knowingly" modify the immediately subsequent clause only or each of the three clauses that follow, we agree.

¶9 Based on the instruction the court gave, the jury could reasonably have found Martin guilty of child abuse if it concluded he had permitted the health of his child to be endangered—in the absence of any finding he had done so intentionally or knowingly.[4] The instruction essentially permitted the jury to find Martin strictly liable if it found A. had been abused while Martin had care or custody of the child. Such an interpretation of the instruction would not be a correct reflection of the law. Section 13-3623, read in its entirety, makes it clear that a requisite *mens rea* applies to all acts of potential child abuse. *See id.* (describing three potential culpable mental states for child abuse and applying them without exception to the *acti rei*); *see also* A.R.S. § 13-202(A) (mental state applicable to all elements unless "contrary legislative purpose plainly appears").

¶10 When an erroneous instruction allows a jury to reach a guilty verdict without necessarily finding every element of the offense, we have not hesitated to reverse the defendant's conviction. *State v. Amaya-Ruiz*, 166 Ariz. 152, 173, 800 P.2d 1260, 1281 (1990) (conviction reversed when improper instruction may have led jury to find defendant guilty of manslaughter without finding he had requisite mental state toward unborn child);

---

[4]We do not consider the post-verdict statements of three jurors submitted by Audra indicating that they drew precisely that erroneous conclusion from the instruction. *See* Ariz. R. Crim. P. 24.1(d), 17 A.R.S. (court cannot consider testimony that "inquires into the subjective motives or mental processes" leading juror to reach verdict).

State v. Williams, 154 Ariz. 366, 368, 742 P.2d 1352, 1354 (1987) (burglary conviction reversed when erroneous instruction prevented jury from considering whether defendant was "armed" under meaning given term by court); *see also State v. Johnson*, 205 Ariz. 413, ¶ 25, 72 P.3d 343, 350 (App. 2003) (conviction reversed because jury could have been misled by transferred intent instruction to convict defendant of assault without evidence of requisite intent to place victim in reasonable apprehension of physical injury); *State v. Siner*, 205 Ariz. 301, ¶ 17, 69 P.3d 1022, 1026 (App. 2003) (conviction reversed because of improper transferred intent instruction).

¶11 The state presented ample evidence of A.'s injuries and substantial but controvertible evidence that Martin either intentionally caused those injuries or had been aware of their extent or nature. And, because Martin, although not A.'s primary caregiver, had the care and custody of the child, jurors could have found him guilty of child abuse based on the erroneous assumption that they did not have to find he had acted with knowledge or intent. Thus Martin has established he was prejudiced by the instruction because it permitted the jury to find him guilty without finding every element of the offense had been established. *See State v. Johnson*, 155 Ariz. 23, 26, 745 P.2d 81, 84 (1987) ("Where there is the possibility that the defendant was convicted [because of] deficient jury instructions, the conviction must be reversed."); *see also State v. Ontiveros*, 206 Ariz. 539, ¶ 19, 81 P.3d 330, 334 (App. 2003) (reversible error when defendant may have been convicted for nonexistent offense). Accordingly, we reverse Martin's convictions and remand the case for a new trial.

OTHER ACT EVIDENCE

¶12 Martin argues the trial court erred by permitting the state to introduce, over his objection, evidence of his alleged "prior bad acts." We review the trial court's admission of other act evidence pursuant to Rule 404(b), Ariz. R. Evid., 17A A.R.S., for an abuse of discretion. *See State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999). "Although evidence of prior acts may not be used to prove the defendant's propensity to commit the crime, it is admissible when used to prove the defendant's 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" *Id.*, *quoting* Ariz. R. Evid. 404(b).

¶13 Our rules of evidence provide four safeguards to protect a defendant from unfair prejudice resulting from the admission of other act evidence: the evidence must be admitted for a proper purpose, Rule 404(b); the evidence must be relevant, Rule 402, Ariz. R. Evid.; the probative value of the evidence must be substantially outweighed by its danger of unfair prejudice, Rule 403, Ariz. R. Evid.; and the jury must be given a limiting instruction if the defendant requests it, Rule 105, Ariz. R. Evid. *See State v. Atwood*, 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *see also Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496, 1502 (1988). In addition, the state must establish by clear and convincing evidence that the defendant committed the other act. *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997).

¶14 Here, the state filed a notice of intent to use evidence that Martin had abused his former girlfriend Coral Moyer's eighteen-month-old son, R., in Kansas in late 1987 and early 1988. After an extensive hearing, the trial court found that the evidence was relevant and admissible against Martin "to prove motive, intent, knowledge, identity, and absence of mistake, accident, or noncriminal causes" for A.'s injuries.

¶15 Moyer testified at trial that she believed Martin had abused her youngest son, R.. She had been living with Martin and her two sons and had left them alone with Martin at times. On Christmas Eve, Moyer let Martin watch R. while R. played in the water after a bath and she changed clothes. Shortly thereafter, R.'s grandmother noticed bruising in his diaper area, which Moyer testified had not been there before she left R. alone with Martin. Moyer also testified that a bruise had appeared on R.'s shin while he was with Martin, who told Moyer that R. had fallen and had hit the table. Finally, on an evening in January 1988, Moyer went to the store with her mother while R. was asleep and Martin was home. When Moyer returned from the store, R. had bruises on his entire face. Martin explained that the dog had knocked R. into the refrigerator. The next day when Martin left the home, Moyer noticed more bruising on R.'s back while dressing him. She called the police, who took R. to the hospital. Both Velda and Milton Dick, Moyer's mother and brother, corroborated her testimony that they had seen bruising on R. in December 1987 and January 1988.

¶16 During a break from Moyer's testimony, the court instructed the jury not to consider the evidence of Martin's alleged other acts to prove his character but only to consider it with respect to Martin's "intent, the identity of the perpetrator of the crimes

alleged in this case, and the absence of accidental causes of the injuries sustained by [A.]." The court repeated the instructions to the jury at the close of trial.

¶17 Martin argues the evidence that the prior acts had occurred was not clear and convincing because Moyer's testimony was not credible. But the trial court makes the preliminary determination whether evidence of a prior act is clear and convincing before it may be presented to the jury. *State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004). As a necessary part of that determination, the court must determine whether witnesses are credible, *id.* ¶ 35, a determination to which we defer. *State v. Gerlaugh*, 134 Ariz. 164, 167, 654 P.2d 800, 803 (1982) ("[T]he trial court is in the position to assess the credibility of the witnesses, to observe their demeanor and to determine possible bias or interests."). Here, the court found the evidence was clear and convincing after it heard testimony of Moyer, her mother, and her brother. *See Nordstrom*, 200 Ariz. 229, ¶ 57, 25 P.3d at 736 (one person's testimony that defendant had solicited his help in robbery satisfied clear and convincing standard when corroborated by other testimony). We cannot say the trial court abused its discretion by finding the evidence established clearly and convincingly Martin had committed the other acts.

¶18 Martin relies on *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996), to support his contention that the other act evidence was not admitted for a proper purpose. He contends because his defense was that A. suffered from TBBD and not that he had harmed A. accidentally, neither intent nor lack of accident was at issue. In *Ives*, our supreme court held that other act evidence was inadmissible under Rule 404(b) to prove either intent or

lack of accident in a sexual molestation case where the defendant was claiming he never committed the crime at all—that he never touched the girls on inappropriate parts of their bodies, not that the touching was mistaken or accidental.[5] *See id.* at 109-11, 927 P.2d at 769-71.

¶19 We do not find *Ives* controlling. Martin's and Audra's defense—that normal handling had caused A.'s injuries because she suffered from TBBD—is no different than a claim that they caused A.'s injuries innocently or mistakenly, and therefore, did not remove the issue of their state of mind from the case. *See id.* at 110-11, 927 P.2d at 770-71. And if evidence is admissible for one purpose under Rule 404(b), we can affirm the trial court's ruling on that basis alone. *See State v. Valles*, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989).

¶20 Finally, Martin argues the prejudicial effect of the evidence outweighed its probative value. But Martin's only complaint is that it was the only evidence tending to show he was the abuser. This does not rise to the level of unfair prejudice; rather "[i]t was adversely probative in the sense that all good relevant evidence is." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). We find no error.

EXPERT TESTIMONY

¶21 Martin argues the expert testimony on battered child syndrome exceeded the scope of admissibility under Rules 702 and 704, Ariz. R. Evid., 17A A.R.S., and invaded the province of the jury to decide an ultimate issue in the case. We review a trial court's

[5]The court in *Ives* also addressed the "common plan" ground for admission of Rule 404(b) evidence, but that ground is not an issue in this case.

ruling admitting expert testimony for an abuse of discretion. *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983). Qualified expert witnesses may give opinions that assist the jury in understanding evidence or determining facts, even when those opinions embrace the ultimate issue in the case. *See* Ariz. R. Evid. 702, 704.

¶22 Before trial, Martin moved to preclude expert testimony about battered child syndrome, but the court allowed the testimony, finding it would assist the jury in understanding the evidence and determining material facts. The court ruled the state's expert could testify about what the syndrome is, what conditions would lead to its diagnosis, and whether the expert would hypothetically reach a diagnosis of battered child syndrome based on the evidence in this case. The court also precluded the expert from testifying that A. had been subjected to child abuse, was a victim of battered child syndrome, or that Audra or Martin had committed child abuse or acted intentionally.

¶23 "Battered child syndrome has become an accepted medical diagnosis." *State v. Moyer*, 151 Ariz. 253, 255, 727 P.2d 31, 33 (App. 1986). The diagnosis, usually used in connection with children under the age of four, is "that a child of tender years found with a certain type of injury has not suffered those injuries by accidental means, but rather is the victim of child abuse." *Id*. Here, Dr. Binkiewicz testified that, in her medical opinion, a child with A.'s background and injuries "would be very highly likely to be a battered child."

¶24 While Martin concedes "[a]n expert was needed to explain to the jury the complicated medical issues," he contends the expert testimony here exceeded the permissible scope of such testimony and invaded the province of the jury. *State v. Lindsey*,

149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (experts exceed scope of rules if they testify about witness credibility, belief in guilt or innocence, or how jury should decide case). But the admission of expert testimony on battered child syndrome in child abuse cases, for the same purposes it was admitted here, is well established in Arizona. *See State v. Hernandez*, 167 Ariz. 236, 239, 805 P.2d 1057, 1060 (App. 1990) (testimony admitted because jury "lacked the medical expertise to determine whether the child's injuries were more likely to have been accidentally or intentionally inflicted"); *Moyer*, 151 Ariz. at 255, 727 P.2d at 33 (testimony admitted because child unable to testify about cause of injuries); *State v. Poehnelt*, 150 Ariz. 136, 150, 722 P.2d 304, 318 (App. 1985) (testimony admissible to establish injuries intentional not accidental); *State v. Turrubiates*, 25 Ariz. App. 234, 238, 542 P.2d 427, 431 (1975) (mentioning without comment admission of expert testimony on battered child syndrome, noting it "established a reasonable inference that the child died as a result of a criminal agency"). We find no error in the admission of the expert testimony.

SUFFICIENCY OF EVIDENCE

¶25 Martin argues there was insufficient evidence that A.'s skull fractures had been inflicted under circumstances likely to produce death or serious physical injury, and therefore, the trial court erred by denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. Under that rule, a court shall enter judgment for the defendant "if there is no substantial evidence to warrant a conviction." *Id*. "Substantial evidence is proof that a rational trier of fact could find sufficient to support a conclusion of

guilt beyond a reasonable doubt." *State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998).

¶26 Audra and Martin were convicted of two counts of child abuse "under circumstances likely to produce death or serious physical injury." § 13-3623(A). "Likely" under the statute means "probably," not just potentially. *State v. Greene*, 168 Ariz. 104, 108, 811 P.2d 356, 360 (App. 1991). Three of the state's medical experts testified at trial that severe skull fractures can cause a great risk of brain injury. The state presented evidence that A.'s skull fractures were very severe, that it takes substantial force to fracture an infant's skull as A.'s had been fractured, and that A. was fortunate to not have sustained a brain injury. One doctor testified a brain injury resulting in death likely could occur from the fractures. Based on this testimony, the jury reasonably could have concluded that A.'s skull fractures had been inflicted in a manner likely to produce death or serious physical injury.

PROSECUTORIAL MISCONDUCT

¶27 Martin argues the trial court erred by denying his motion for a new trial based on the prosecutor's alleged misconduct during the state's rebuttal argument. The court sustained Martin's objection to the improper argument and ordered it stricken from the record. Because we have already decided Martin is entitled to a new trial, and because the trial court expressed its disapproval of the prosecutor's statements—so that they presumably will not be repeated in a new trial—we need not address this issue further.

DISPOSITION

¶28 Reversed and remanded for proceedings consistent with this decision.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
PHILIP G. ESPINOSA, Judge